

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
911 Fee Diversion)	PS Docket No. 20-291
)	
New and Emerging Technologies 911)	PS Docket No. 09-14
Improvement Act of 2008)	

**COMMENTS OF NEW YORK STATE
DIVISION OF HOMELAND SECURITY AND EMERGENCY SERVICES
ON THE NOTICE OF PROPOSED RULEMAKING**

The New York State Division of Homeland Security and Emergency Services (DHSES) offers the following comments in response to the Federal Communications Commission’s March 3, 2021 Notice of Proposed Rulemaking.¹

I. Proposed Rule Exceeds Statutory Authority by Creating Rule for Fees or Charges Other Than Those Specifically Designated for 911 Services

A. The Proposed Definition of “911 Fee or Charge” Over-Inclusively Applies to Public Safety, Emergency Services, and Other Multi-Purpose Fees or Charges

The Commission seeks comment on extending the definition of “911 fee or charge” to include fees or charges designated for the support of “public safety,” “emergency services,” or similar purposes if the purposes or allowable uses of such fees or charges include the support or implementation of 911 services.² The Commission should revise its rule to define “911 fee or charge” as those fees or charges specifically designated for the support of 911 services, whereby bringing it into alignment with statute.³ As currently proposed, “911 fee or charge” includes fees

¹ Notice of Proposed Rulemaking, PS Docket No. 20-29 & 09-14 (rel. February 17, 2021) (Proposed Rule).

² Proposed Rule, paras. 16 & 17.

³ See 47 U.S.C. 615a-1(f).

and charges which support a broader set of purposes, to include 911 services, which is overbroad, overreaching, and outside the scope of the authority for this rule.

The proposed definition of “911 fee or charge” is ultra vires. The Commission’s statutory authority is limited to “specifically designated” 911 fees or charges.⁴ The statute prohibits the Commission from restricting the “imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services *specifically designated* by a State . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, consistent with the purposes and functions designated” in the Commission’s rules.⁵ The intent of this rule is to prevent the diversion of 911 fees or charges, defined as “a fee or charge applicable to commercial mobile services or IP-enabled voice services *specifically designated* by a State or taxing jurisdiction for the support or implementation of 9-1-1 services.”⁶

Notwithstanding, the Commission’s proposed rule states that “[a] 911 fee or charge shall *also* include a fee or charge designated for the support of public safety, emergency services, or similar purposes if the purposes or allowable uses of such fee or charge include the support or implementation of 911 services.”⁷ The Commission seeks to expand its reach to fees and charges in addition to those which are specifically designated for the support of 911 services; it seeks to regulate public safety, emergency services, and other fees or charges not specifically designated for 911 services. The proposed rule ignores the repeated use of “specifically designated” from

⁴ See 47 U.S.C. 615a-1(f)

⁵ 47 U.S.C. 615a-1(f)(1) (emphasis added).

⁶ 47 U.S.C. 615a-1(f)(3)(D)(i) (emphasis added).

⁷ Proposed Rule, Appendix A, § 9.22 (emphasis added).

the statute and replaces it with a general inquiry into the “allowable uses” of the fee. The Commission, tasked with monitoring the diversion of specifically designated 911 fees, is proposing rules that apply to the broader category of public safety and emergency communications generally. The application of the Commission’s rule must be limited to fees and charges that are specifically designated for 911 services; the Commission is not authorized to regulate fees and charges designated for other purposes.

B. The Proposed Rule for Multi-use Fees or Charges Exceeds the Statutory Authorization to Create a Rule for Fees or Charges Specifically Designated for 911 Services

The Commission seeks comment on its proposal defining acceptable purposes and functions for “multi-purpose” fees or charges.⁸ The Commission should revise its proposal to reflect that multi-purpose fees and charges fall outside the scope of its authority. The Commission should remove accounting rules for multi-purpose fees or charges from its proposed rule.

The Commission proposes that:

“If a State or taxing jurisdiction collects fees or charges designated for ‘public safety,’ ‘emergency services,’ or similar purposes that include the support or implementation of 911 services, the obligation or expenditure of such fees or charges shall not constitute diversion provided that the State or taxing jurisdiction: (1) Specifies the amount or percentage of such fees or charges that is dedicated to 911 services; (2) Ensures that the 911 portion of such fees or charges is segregated and not commingled with any other funds; and (3) Obligates or expends the 911 portion of such fees or charges for acceptable purposes and functions as defined under this section.”⁹

⁸ Proposed Rule, paras. 28 & 29.

⁹ Proposed Rule, Appendix A, § 9.23(d).

With these rules the Commission compounds its erroneously broad interpretation of the types of fees and charges it can regulate by creating accounting rules for fees and charges other than those specifically designated to support 911 services.

This proposed rule explicitly applies to fees and charges other than those specifically designated to support 911 services, and it again replaces the statutory phrase “specific designation” with the broad set of possible uses of a fee or charge. The rule then creates a required accounting structure for fees and charges not specifically designated for 911 services; these broader fees and charges must now specify the exact portion used for supporting 911 services, a separate account for these separated funds must be created, and the purposes of the expenditures from these accounts must be explained to the satisfaction of the Commission.

The Commission’s creation of a “safe harbor”¹⁰ for fees and charges which are not 911 fees or charges is evidence that the proposed rule is overly broad. The Commission is tasked with creating rules that identify the diversion of specifically designated 911 fees or charges, but has instead proposed rules that place the burden on states to show that fees and charges not specifically designated for 911 services are segregated from any funds potentially supporting 911 services. A statutory authorization that enables rules focused on specifically designated 911 fees cannot be used to justify accounting rules for fees and charges that are not specifically designated for 911 services. The Commission cannot broaden the scope of fees and charges it may regulate and subsequently demand states implement specific accounting practices for those broader fees and charges that fall outside the Commission’s purview.

¹⁰ Proposed Rule, para. 28.

II. Public Safety Communications Systems and Interoperability Should be Included as Acceptable Purposes and Functions

The Commission seeks comment on its proposed designation of acceptable purposes and functions for expenditures of 911 fees or charges.¹¹ The Commission should reexamine its prior findings that expenditures on public safety communications infrastructure are not sufficiently related to 911 services¹² and recognize the integral connection between 911 services and public safety communications. Further, the commission should revise its proposal to include public safety radio system infrastructure and interoperability expenditures as allowable purposes and functions.

With respect to the Commission’s proposed rules for designating the acceptable purposes and functions on which 911 fees or charges may be spent, the underlying statute states that the “purposes and functions designated . . . shall be limited to the support and implementation of 9-1-1 services provided by or in the State or taxing jurisdiction imposing the fee or charge and operational expenses of public safety answering points within such State or taxing jurisdiction.”¹³ Additionally, the Commission’s designation of acceptable purposes and functions should be consistent with the statutory section that allows states to petition the Commission for recognition of additional expenditures as being for acceptable purposes or functions.¹⁴ The petition section requires the Commission to recognize expenditures as being for acceptable purposes and functions when the expenditure “(i) supports public safety answering point functions or operations; or (ii) has a direct impact on the ability of a public safety answering point to (I) receive or respond to 9-1-1 calls; or (II) dispatch emergency responders.”¹⁵ The

¹¹ Proposed Rule, paras. 21-27.

¹² Proposed Rule, para 25 (citing prior reports to Congress on 911 fees)

¹³ 47 U.S.C. 615a-1(f)(3)(B).

¹⁴ 47 U.S.C. 615a-1(f)(5).

¹⁵ Id.

Commission should not interpret “support and implementation of 9-1-1 services” in such a narrow manner so as to undermines the overall goal of providing effective 911 services to the public. Rather, the Commission should recognize the importance of the entirety of the public safety communications system, which includes public safety answering points (PSAPs) and their ability to dispatch emergency responders.

The Commission’s proposed rule allows 911 fees to be spent on “[i]ntegrating public safety/first responder dispatch and 911 systems ...” and “[p]roviding for the interoperability of 911 systems with one another and with public safety/first responder radio systems.”¹⁶ However, the proposed rule excludes “[e]quipment or infrastructure for . . . public safety/first responder entities, including public safety radio equipment and infrastructure, that does not have a direct impact on the ability of a PSAP to receive or respond to 911 calls or to dispatch emergency responders.”¹⁷

Public safety radio systems provide the integral connection between PSAPs and first responders, making such systems essential to the support and implementation of 911 services. The proposed exclusion of public safety radio infrastructure that does not have an impact on the ability to dispatch emergency responders is a contradiction. Public safety communications infrastructure by necessity has a direct impact on the ability of a PSAP to dispatch emergency responders. The observation that “radio networks used by first responders are technically and operationally distinct from the 911 call-handling system”¹⁸ is a distinction that ignores the overall goal of 911 services. Public safety communication systems are most effective when they

¹⁶ Proposed Rule, Appendix A, § 9.23(b)(4) & (5).

¹⁷ Proposed Rule, Appendix A, § 9.23(c)(3).

¹⁸ Propose Rule, para. 25 (quoting FCC, Eleventh Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges at 42, para. 32 (2019) (Eleventh Report)).

address all users. This requires connecting the general public to 911 Centers and their telecommunicators who, in turn, communicate with first responders in the field.

The Commission has recognized that the integration of public safety dispatch and 911 systems is a permissible use of 911 fees or charges.¹⁹ Further, the Commission has recognized expenditures as being permissible if they “(1) support PSAP functions or operations, (2) have a reasonable nexus to PSAPs’ ability to receive 911 calls and/or dispatch emergency responders, or (3) relate to communications infrastructure that connects PSAPs (or otherwise ensures the reliable reception and processing of emergency calls and their dispatch to first responders).”²⁰ Consistent with these principles, the Commission should recognize that the ability of a PSAP to dispatch first responders depends on the public safety communications system itself, and that having the resources to answer a 911 call is useless without also having the resources to communicate with first responders.

Further, the interoperability of public safety radio systems is essential to the continued provision of 911 services during major events and disasters. The practical resource limitations of typical local first responders necessitate a reliance on first responders from non-local jurisdictions to respond to requests for assistance during events that exceed local capacity. The continued ability to provide 911 services during such emergencies and dispatch non-local first responders depends on interoperable public safety communications systems. Effective 911 services and public safety communications require that first responders in the field can communicate directly with each other when responding to incidents, including first responders

¹⁹ See FCC, Twelfth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges, para. 26 (2020) (Twelfth Report); Eleventh Report, para. 26.

²⁰ See Proposed Rule, para. 23, n. 49 (citing FCC, Tenth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges, para. 40 (2018) (Tenth Report)).

from different agencies and jurisdictions. Therefore, expenditures on the interoperability of public safety communications systems should be recognized as a component of providing effective 911 services during major incidents.

This broader approach would align with the legislative history cited by the Commission in its Notice of Proposed Rulemaking. The Commission cites a House Committee on Energy and Commerce report that noted several states were known to be using 911 fees for “purposes other than 911 or emergency communications services.”²¹ The report further notes that the use of 911 fees should be “directly tied to the operation and provision of emergency services by the PSAPs.”²² The report’s general characterization of acceptable purposes does not support the Commission’s refusal to recognize that public safety communications networks and infrastructure are directly tied to the provision of emergency services by PSAPs. These systems are critical for PSAPs to communicate with first responders.

In forming its rules, the Commission must account for the broader communications ecosystem into which 911 services connect. A myopic focus on features of the communications ecosystem that are physically proximate to PSAPs should not undermine the broader communications network that underlies effective 911 services.

III. Commission Has Not Consulted with Public Safety Organizations and States

The Commission is statutorily required to “consult with public safety organizations and States and taxing jurisdictions” as part of this rulemaking.²³ However, the Commission has not

²¹ Proposed Rule, para. 26 (citing House of Representatives Committee on Energy and Commerce, Report on 911 Modernization and Public Safety Act of 2007, H. Rept. 110-442 at 11 (2007) (*H. Rept. 110-442*), <https://www.congress.gov/110/crpt/hrpt442/CRPT-110hrpt442.pdf>.

²² Proposed Rule, para. 26 (quoting *H. Rept. 110-442* at 15).

²³ 47 U.S.C. 615a-1(f)(3)(C) (“The Commission shall consult with public safety organizations and States and taxing jurisdictions as part of any proceeding under this paragraph,” where “this

met its obligation under the statute or the Administrative Procedure Act. The notice of proposed rulemaking makes no clear reference to any of the required consultation, thereby preventing input and consideration by the regulated parties. Further, the Commission has not yet reached out to impacted states, including New York, for consultation on this proceeding.

The comments being offered in response to the Proposed Rule cannot themselves constitute the required consultation. Rather, the consultation must be in addition to the comments made in response to the Proposed Rule; otherwise, the specific requirement to engage in consultation would be a nullity in light of the preexisting duty to open the rule to comments under the Administrative Procedure Act.²⁴ Comments offered in response to other rulemakings or notices of inquiry are not specific to the topic of this rulemaking: defining acceptable purposes and functions for 911 fees or charges in federal regulation. Moreover, comments offered in response to rulemakings or notices of inquiry issued prior to the effective date of the underlying statute cannot meet such obligation. The statute authorizing this Proposed Rule was enacted after the Commission issued its Notice of Inquiry on 911 fee diversion.²⁵ The Commission provides no basis for viewing the later-enacted statutory consultation requirement as being satisfied by its pre-enactment Notice of Inquiry.

For this rule to be valid, the Commission must engage in the required consultation, clearly identify the consultation, and thereafter provide an opportunity for additional comments.

paragraph” refers to paragraph (f)(3), the statutory authorization for the Commission to create rules for acceptable obligations or expenditures).

²⁴ See, e.g., *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (reciting interpretive canon against surplusage).

²⁵ Compare Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (enacted December 27, 2020) with Notice of Inquiry, PS Docket No. 20-291 (adopted September 30, 2020; rel. October 2, 2020).

Respectfully submitted,

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